STATE OF MICHIGAN

COURT OF APPEALS

DAIMLER CHRYSLER CORPORATION,

Plaintiff-Appellee/Cross-Appellant,

v

PROCESS DEVELOPMENT CORPORATION,

Defendant-Appellant/Cross-Appellee,

and

PROCESS DEVELOPMENT CORPORATION,

Third-Party Plaintiff-Cross-Appellee,

v

ITT HARTFORD INSURANCE GROUP, a/ka/ THE HARTFORD,

Third-Party Defendant-Cross-Appellant.

UNPUBLISHED
July 24, 2003

No. 234827
Wayne Circuit Court
LC No. 99-922898-CK

DAIMLER CHRYSLER CORPORATION,

Plaintiff,

v

PROCESS DEVELOPMENT CORPORATION,

Defendant,

and

PROCESS DEVELOPMENT CORPORATION,

No. 235741
Wayne Circuit Court
LC No. 99-922898-CK

Third-Party Plaintiff-Appellee,

v

ITT HARTFORD INSURANCE GROUP, a/k/a THE HARTFORD,

Third-Party Defendant-Appellant.

Before: Sawyer, P.J., and Meter and Schuette, JJ.

PER CURIAM.

These consolidated cases primarily involve (1) whether Daimler Chrysler Corporation (Chrysler) or Process Development Corporation[1] (PDC) should be responsible for compensating a person, Richard Gladigan, injured in one of Chrysler's plants and (2) whether ITT Hartford Insurance Group (Hartford), PDC's insurer, must cover PDC's losses if PDC is required to compensate Gladigan. The trial court found that PDC must compensate Gladigan and that Hartford must cover PDC for its losses. It also awarded attorney fees to Chrysler in its lawsuit against PDC and to PDC in its lawsuit against Hartford. The appeals take issue with the court's primary rulings as well as with the court's attorney fee awards. We affirm in Docket No. 234827 but reverse in Docket No. 235741.

On February 3, 1997, Gladigan, a PDC employee, was injured at a Chrysler plant in Twinsburg, Ohio, when a Chrysler employee operating a forklift caused a rack to fall on Gladigan while he was walking on a pedestrian walkway. Gladigan sued Chrysler, and the parties settled the case for $500,000. Subsequently, Chrysler, seeking to recoup the $500,000, sued PDC, alleging that PDC was responsible for compensating Gladigan's injury under the terms of a particular purchase order. The purchase order[2] stated that it incorporated by reference a document entitled "Facilities & Materials Purchasing General Terms and Conditions" (F&MPGTC). The F&MPGTC contained the following language:

> 11. INSURANCE AND INDEMNIFICATION. (a) Insurance. Seller will provide worker's compensation, comprehensive general liability, automobile, public liability, and property damage insurance in amounts and coverages

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[1] This corporation is a consulting firm that aids automobile manufacturers in improving their manufacturing processes.

[2] As noted *infra*, the number of the original purchase order, dated May 17, 1996, and containing a latest delivery date of April 30, 1997, was JYPAL02297-A. This purchase order was later amended, on February 26, 1997, and was given number JYPAL02297-B. The amendment listed the "reason for amendment" as the addition of funds in order for the project in question to continue through December 1997. Order JYPAL02297-B stated that it "cover[ed] January[] 1997 through December 1997."

> sufficient to cover all claims hereunder. Such policies will name Chrysler as an additional insured thereunder and shall contain endorsements stating that the policies are primary and not excess over or contributory with any other valid, applicable, and collectible insurance in force for Chrysler. Chrysler may require Seller to furnish evidence of the foregoing insurance but failure to comply with these insurance requirements will not relieve Seller of its liability and obligations under this clause. Chrysler's action or inaction will not act as a waiver of any of Chrysler's rights described in this clause.
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> (b) Indemnification. Seller will defend, indemnify, and hold Chrysler harmless against all claims, liabilities, losses, damages, and settlement expenses in connection with any breach by Seller of these general conditions or for injury or death of any person and damage or loss of any property allegedly or actually resulting from or arising out of any act, omission or negligent work of Seller or its employees, agents, or subcontractors in connection with performing this order, either on Chrysler's property or in the course of their employment.

Chrysler alleged that PDC breached both (a) and (b) above by failing to indemnify Chrysler and by failing to name Chrysler as an additional insured under its insurance policy. Citing MCR 2.116(C)(10), Chrysler moved for partial[3] summary disposition, primarily arguing that

> the court should rule that the extent of negligence attributable to Chrysler for Gladigan's injuries is irrelevant to Chrysler's claim for contractual indemnity. The court should also find as a matter of law that the [F&MPGTC] form a part of the contract(s) at issue. Finally, the court should find as a matter of law that PDC breached its contract with Chrysler by failing to name it as an additional insured to its coverage.

In its response to Chrysler's motion, PDC argued, among other things, that the purchase order or orders in question did not cover Gladigan's work on February 3, 1997, and that § 11(b) of the F&MPGTC did not allow for the indemnification of Chrysler if the losses in question arose from Chrysler's negligence. The trial court ruled from the bench as follows:

> . . . this court is of the opinion that there really isn't any dispute as it relates to a genuine issue of material fact that the purchase order covered the DN or the Durango Platform operations at the Twinsburg Plant from May 30th of '96 through April 30th of '97 in the initial purchase order which was extended until December of '97 with the second purchase order that really only increased the amount of money that would be paid and the duration of the contract.

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[3] In a reply brief filed by Chrysler after PDC filed its response to the partial summary disposition motion, Chrysler indicated that it was "entitled to an order of partial summary disposition on all liability issues" and that it would "present a separate motion seeking summary disposition on damage issues."

> Mr. Gladigan was injured on February 3rd of '97 which was within the time frame of the original purchase order. And he was employed under the purchase order terms, the purchase order as part of the contract that the parties required that [PDC] insure and indemnify Chrysler.
>
> There is really no dispute that [PDC] failed to name Chrysler as [an] additional insured on the insurance policy. The indemnity provision referenced coverage for all claims in that purchase order thus there is really no issue of material fact, no genuine issue of material fact that the negligence of Chrysler, if any, would relieve [PDC] of its obligation to indemnify and insure Chrysler.
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> * * *
>
> Under the purchase order agreement, [PDC was] required to insure and indemnify and name Chrysler as an additional insured and to indemnify Chrysler under that purchase order.

The trial court's written order stated, in part:

> a. [The purchase order] incorporates by reference the [F&MPGTC] into its terms, which terms were in writing, executed and in existence prior to 3 February 1997.
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> b. That paragraphs 11A and 11B of the [F&MPGTC] concerning insurance and indemnification containing the terminology "any and all claims" operates to indemnify [Chrysler] for damages for injuries arising out of the negligence of its own . . . employees.
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> c. The aforementioned contract covered all [PDC] work concerning the Dodge Durango platform . . . regardless of where that work was performed and therefore the injury to Richard Gladigan on 3 February 1997 falls under the provisions of the contract referred to above.

In Docket No. 234827,[4] PDC first argues that the trial court erred in granting summary disposition to Chrysler because evidence demonstrated that the purchase order or orders in question did not apply to Gladigan on February 3, 1997. We review de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. See, generally, *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998).

A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The moving party must initially support its position by affidavits, depositions, admissions, or other documentary evidence. *Id.* at

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[4] We will address each issue from Docket No. 234827 before progressing to Docket No. 235741.

455. "'The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.'" *Id.*, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). If the nonmoving party would bear the burden of proof at trial, that party may not merely rely on the allegations or denials in the pleadings but must set forth specific facts demonstrating the existence of a genuine issue of material fact. *Smith, supra* at 455. The trial court must view the affidavits and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Id.* at 454. If the opposing party fails to establish the existence of a material factual dispute, summary disposition is appropriate. *Id.* at 455.

We find no basis for appellate relief.

The original purchase order in question, order JYPAL02297-A, specified the "date of order" as May 17, 1996, and listed monthly dates between May 30, 1996, and April 30, 1997, under the heading "delivery." The order was amended and assigned the number JYPAL02297-B on February 26, 1997. Order JYPAL02297-B stated, as the "reason for amendment," that the original order was being amended to add funds "to cover continuation of the project through Dec[] 1997." It also noted that "all other terms and conditions remain unchanged" and that it "cover[ed] January[] 1997 through December 1997." Each order stated that it applied to "jeep and truck engineering." Each also stated, "purchase order issued to cover the cost of 98 DN[5] quality improvement process." Order JYPAL02297-A contained the following phrase: "98 DN quality improvement process based on $37.00 per hr. for two (2) sr. vehicle engineers per month[.]" Order JYPAL02297-B stated, "covers January, 1997 through December 1997."

James Pongracz shed some light on the purchase orders at his deposition. Pongracz testified that he is the sole shareholder in PDC. He stated that Chrysler asked PDC for help in improving the quality of the manufacturing processes for various vehicle "platforms," such as Jeep/truck, mini vans, passenger cars, and so forth. He identified order JYPAL02297-A as one relating to

> two senior vehicle engineers . . . who were located at the Jeep and Truck Engineering Center on Plymouth Road that worked on the advanced quality planning associated with the DN program. They did analysis of the quality plan, helped to develop the quality plan and did some auditing of the specific early built vehicles relative to . . . performance.

When asked who the two "senior vehicle engineers" were, Pongracz stated, "Jeff Curcio, . . . I think, and Tina Ballenger and Darrin Lapinski would have come out specifically to look at the vehicles if there was a specific reason to look at them."

Pongracz testified that in January 1997,[6]

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[5] As alluded to in the trial court's ruling, this acronym refers to the Dodge Durango.

[6] Chrysler's attorney often questioned Pongracz about Gladigan's work in January 1997, even though the accident occurred in February 1997. It appears that the attorney was trying to (continued…)

> Gladigan was assigned to work on the DN program. He was formally – and I think I gave you the work papers again relative to the DN program – to work on some stamping issues at Twinsburg, and we specifically had a proposal that dealt with his work in the time-frame between July and December of '96.

He stated that the Gladigan's work in January 1997 related to the DN platform and that order JYPAL02297-A also related to the DN platform. He indicated that Gladigan was a "quality engineer" and was "helping the plant to train the hourly people and the salary people in a variety of different quality tools . . . ."

When asked whether PDC was "getting paid by Chrysler Corporation for the services that [PDC was] providing to Twinsburg, including the services of Mr. Gladigan," Pongracz stated:

> Yeah, we – you know again, we had a team in place at JTE and at Delaware and we had people at Twinsburg, and when we invoiced, we invoiced around the DN program. And really those people to a large degree, they could go to a variety of different locations. I mean, they could be in Twinsburg. They could also be in an outside supplier, depending upon what the particular moment was relative to the launch of the program, itself.

Chrysler's attorney showed Pongracz an invoice dated February 28, 1997, and Pongracz testified that the invoice was "the monthly invoice associated with the '98 DN quality improvement process" and that it referred to purchase order JYPAL02297-B. He admitted that when submitting an invoice to Chrysler, PDC needed to identify a particular purchase order under which PDC's services were being billed. Chrysler's attorney asked Pongracz if he knew whether Gladigan's time for January 1997 was included in the invoice marked February 28, 1997, and Pongracz stated:

> No, I don't. And again, I would say to you that I'm sure that [the invoice] relates to the agreement between us and Chrysler relative to an amount to some preset schedule that we agreed to in our cost proposal. It is our practice, by the way, and in the NS program this became apparent that at certain times we actually have more people working on a project than were being paid for because we would make a decision that this was a strategic thing, had to happen, had to happen now, and we would accelerate that process. So that we could be at any point in time committing more people than what's indicated by the invoice.

Chrysler's attorney asked Pongracz who would know if Gladigan's time in January 1997 was related to the invoice and to order JYPAL02297-B, and Pongracz responded:

> Again, no one would know. No one would know because that's not our practice as to how we bill and how we do our programs. You know, I'm trying – I'm not

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(…continued)

establish that, contrary to Pongracz's implication during his deposition, the purchase orders in question extended to Gladigan's time after December 1996 and Gladigan therefore was paid for work after December 1996 (i.e., for January 1997) under the terms of the purchase orders.

trying to be obstinate but I'm trying to say to you that we have a predetermined monthly amount. So whether they were rolled into the invoice or not, I don't think anyone could come back and at that point in time substantiate that one way or another. I think that we could go back and add everybody up and see what it comes to and all of that, yes, but that's not our practice of how we manage the business.

Pongracz then testified that Gladigan had been working on "stampings" in January 1997 and that the "initial work plan for the DN stamping program initiated in July of '96" ended up being paid under order JYPAL02297-A. He then clarified that only Gladigan's time from "July through December" of 1996 was compensated under order JYPAL02297-A. When asked specifically about January 1997, he stated that "we were complete with our work in December" and that "if we would have extended, it would have been under [order JYPAL02297-B]." He later reiterated that the Twinsburg portion of the DN platform work was completed in December 1996. He stated that no purchase order applied to Gladigan's time in Twinsburg after December 1996 and that "it's not clear to us [if] we ever did get paid for Gladigan's work in January or any other associate." He testified that he did not believe PDC ever billed Chrysler for Gladigan's work in Twinsburg in January and February of 1997, and he indicated that PDC would generally always start work for Chrysler before receiving an applicable purchase order. He later stated that he did not know whether PDC was paid for Gladigan's services in January 1997 under order JYPAL02297-B.

The following colloquy also occurred between Chrysler's attorney and Pongracz:

Q. So the long and short of it is you ultimately received the B version of the purchase order which funded your work through the end of 1997?

A. Yes.

Q. So that the work Mr. Gladigan did in January of 1997, your company would have received remuneration from Chrysler . . . from funds paid under the B version of the purchase order?

A. Well, the problem for me to reconcile, I'm not trying to be exceptionally difficult, is that this assessment covers all the people in Newark and it ties to the 65192250 that you referenced relative to Exhibit 6 [a copy of order JYPAL02297-B], and in that are no people provided or no provision provided to cover Gladigan.

Q. Specifically?

A. Specifically, right.

Q. However, you had people at Twinsburg in January of '97, correct?

A. We had people in Twinsburg in January of '97, yes.

Q. You weren't doing that for free; it was part of the total monies that were being paid to your company for the DN purchase orders that we've referenced, correct?

A. I can make that assumption, yes, but again, I want to say very clearly I'm not sure that that's the case.

Pongracz stated that the only person who would know for sure whether Gladigan's work was covered under order JYPAL02297-A or JYPAL02297-B was Al Carlson, who had since died.

The colloquy then continued as follows:

Q. I'm looking at, sir, excuse me for interrupting, from the PDC point of view, not from the Chrysler point of view. In other words, you're running a business. You're providing people to Chrysler . . . to assist them in the process of apparently improving quality, right?

A. Yes.

Q. As part of that, you had people at the Twinsburg facility in January of 1997?

A. Right.

Q. The consideration for those people going to Twinsburg was the monies that you were receiving from Chrysler . . . , correct?

A. Right.

Q. The monies that you were receiving from Chrysler . . . for your total efforts at that time were through the A and B purchase orders that referenced the platform that we have been discussing, correct?

A. Right.

Q. So that absent raising Mr. Carlson from the dead, from the PDC point of view, the monies that you would get to cover the cost of Mr. Gladigan being at Twinsburg and hopefully a profit were paid under the purchase orders –

A. You're asking me to make that assumption and I'm not going to. I'm going to tell you very clearly, and it should be obvious from the documentation that you're making that assumption. It is an assumption. We could very well have been as the discussion was going on trying to resolve an issue with Twinsburg to have a separate purchase order and a separate arrangement relative to Twinsburg because Twinsburg was attempting to do two or three things at the same time.

One, they didn't want to let people go but it was clear that the funding agreed to by Al Carlson has expired in December.

> Our B provision covered us for the amount of effort and work and people associated with the Newark, primarily the Newark, Delaware location. It is often our practice to say, okay, while we resolve this, we'll allow, since we're working in good faith, that we'll allow the person to continue doing their duties while you figure out what to do, Al. Does the PO come from Twinsburg? Does Twinsburg hire the people? Are we going to pull this person and put him into Delaware where he belongs?
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> Now I'd like to sit here and say to you I know precisely every one of those things but I don't.
>
> *Q*. So you can't tell me specifically then whether the work that Mr. Gladigan was performing specifically on February 3, 1997, would be considered a part of the overall work that PDC provided to Chrysler in conjunction with the B version of the purchase order . . . , correct?
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> *A*. That is true. What I can't also tell you in absolute terms is whether we ever got paid for January because if indeed we agreed it was going to catch up, once we finally resolved how it was going to be done, we would not have billed for him. And then after the accident occurred, you know, things in such chaos, you know, we did not pursue it any further since it seemed to be kind of at that point a moot situation.

From this testimony by PDC's sole shareholder, it is clear to us that no material factual dispute existed concerning whether Gladigan's work on the day of the accident fell within one of the DN purchase orders in question. Significantly, Pongracz testified that "we invoiced around the DN program" for Gladigan's services in Twinsburg. Moreover, even though Pongracz alternatively claimed (1) that he did not know whether Gladigan's work was covered under the DN purchase orders and (2) that no purchase order applied to Gladigan's work in Twinsburg after December 1996, he also claimed (1) that he could make an assumption that the people working in Twinsburg after December 1996 were working under the DN purchase orders, (2) that Gladigan's work after December 1996 related to the DN platform, and (3) that "if we would have extended" the work in Twinsburg after December 1996, it would have been under order JYPAL02297-B. Obviously, Gladigan did continue working in Twinsburg after December 1996. The only reasonable inference from the evidence presented is that Gladigan's work occurred under the DN purchase orders. PDC simply offered no material evidence to counter this conclusion.

As well as citing Pongracz's deposition testimony, PDC cites the deposition testimony of two other people in attempting to demonstrate that the DN purchase orders did not cover Gladigan's work on the day in question. PDC refers to the testimony of Darren Lapinski, a project manager for PDC. Lapinski testified that Gladigan's work in Twinsburg initially related to a different platform from the DN platform (the NS, or minivan, platform) but that this work ended around six months before the accident. Lapinski admitted that Gladigan's timesheet for January 1997 listed a project number that referred to the DN project, but he claimed that this was done simply because (1) the NS funding and purchase order had expired, (2) the Chrysler people at Twinsburg wanted to retain Gladigan's services but no purchase order for the services existed,

(3) Gladigan was "in no man's land" at the time of the accident, and (4) it was expedient to reference the DN project on the timesheet. Lapinski stated:

> Well, he had a project number 30404 [correlated with the DN program] but that was the only project you could closely tie. We have to put a project number. Obviously he wasn't working in the office. Because he was in a transitional state from NS which would have had a different project number and that Twinsburg made a commitment that they were going to try to get funding form Al Carlson in support of DN, we told [Gladigan] instead of using the NS number, since that was ended, that was the closest project that was related to some of the work that he was doing.
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> So from a time sheet, from strictly a time sheet internal PDC standpoint, that was the number that he used because that was the only thing that could vaguely be tied to his – what he was doing.

Lapinski testified that Pongracz must have been mistaken if he claimed that Gladigan's work until December 1996 had been covered under order JYPAL02297-A because, according to Lapinski, no purchase order existed for Gladigan's work at that time. He further stated that order JYPAL02297-B did not relate to Gladigan's work after December 1996 because order JYPAL02297-B related not to work in Twinsburg but instead to work in Newark. Lapinski claimed that Al Carlson, the liaison for the DN program, would not authorize funding for Gladigan under the DN program because Gladigan's work related to "stamping," and "stamping activities were out of [Carlson's] realm. Lapinski stated that when Carlson did not come through with a purchase order, Chrysler employees at Twinsburg were asked to help propose something but that "[t]hey spun their wheels for several months" and "[w]e never did get a purchase order to support the work that we did after NS." He claimed that "[w]e gave Twinsburg good faith because they said that they could seal the deal and that never happened" and that he was not "aware of" any invoices submitted to Chrysler for Gladigan's time in Twinsburg in January 1997. He later stated that PDC was never paid for Gladigan's work in Twinsburg in connection with DN work, but he admitted that he was not "really . . . involved" with accounts receivable and that he actually did not know if PDC had been paid for the work.

PDC also cites the deposition testimony of Bart Baron, another PDC employee, who testified that he did not know whether the DN purchase orders in question covered Gladigan's work in Twinsburg, but that in his understanding of how PDC organized its purchase orders, Gladigan's work likely would not have been covered under order JYPAL02297-A or JYPAL02297-B because Gladigan's work related to "stamping." Baron testified that he told a Chrysler employee, Gary Sapp, that PDC was going to "pull" Gladigan from Twinsburg because there was no purchase order in place for him and "we just couldn't afford doing it gratis any more [sic]." Sapp testified in his deposition that a purchase order *did* cover Gladigan's work at the time of the conversation with Baron, that the funding was extended, and that Gladigan's work in February 1997 related to the DN quality improvement process.

We cannot agree that the testimony of Lapinski and Baron mandates a reversal of the trial court's ruling. First, Baron admitted that he did not know whether the DN purchase orders in question covered Gladigan's work in Twinsburg, and thus his testimony does not aid PDC's case. Moreover, to the extent Lapinski claimed that Gladigan's DN work in Twinsburg was

never covered under either order JYPAL02297-A or JYPAL02297-B, this contradicted the testimony of Pongracz, PDC's sole shareholder, who testified that Gladigan's time from July through December of 1996 was compensated under order JYPAL02297-A.[7] As noted in *Palazzola v Karmazin Products Corp,* 223 Mich App 141, 155; 565 NW2d 868 (1997), "a party may not raise an issue of fact by submitting an affidavit that contradicts the party's prior clear and unequivocal testimony."[8] Pongracz clearly testified that Gladigan's DN work until December 1996 *was* covered under one of the purchase orders in question. Moreover, despite indicating that no purchase order covered Gladigan at the time of the injury, Lapinski testified that he did not actually know whether Gladigan was paid for his DN work in Twinsburg, and he conceded that a January 1997 timesheet for Gladigan referred to the DN project initiated by the purchase orders in question. Also, Pongracz testified that "we were complete with our work [in Twinsburg] in December" and that "if we would have extended, it would have been under [order JYPAL02297-B]." This contradicts Lapinski's testimony that order JYPAL02297-B applied only to Newark. Considering the available evidence, the trial court's ruling that Gladigan was covered by the purchase orders in question was correct.[9] Appellate relief with respect to this issue is unwarranted.

Next, PDC argues that the trial court misinterpreted the material terms of the contract between the parties and therefore erred in ruling that Chrysler's negligence was irrelevant to the case. PDC argues that if Gladigan's injury resulted solely from Chrysler's negligence, then PDC is not obligated to reimburse Chrysler. PDC contends that a remand for trial on the issue of Chrysler's negligence is appropriate. We do not agree.

As noted earlier, the contract's material provisions stated:

> 11. INSURANCE AND INDEMNIFICATION. (a) Insurance. Seller will provide worker's compensation, comprehensive general liability, automobile, public liability, and property damage insurance in amounts and coverages sufficient to cover all claims hereunder. Such policies will name Chrysler as an additional insured thereunder and shall contain endorsements stating that the policies are primary and not excess over or contributory with any other valid, applicable, and collectible insurance in force for Chrysler. Chrysler may require Seller to furnish evidence of the foregoing insurance but failure to comply with these insurance requirements will not relieve Seller of its liability and obligations

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[7] This testimony by Pongracz dispels PDC's suggestion on appeal that neither order JYPAL02297-A or JYPAL02297-B could apply to Gladigan because they covered only three other "vehicle" engineers and not a quality engineer like Gladigan.

[8] While this maxim refers to an affidavit, we believe it also applies in this situation, where an employee of a corporation contradicts the prior testimony of the corporation's sole shareholder.

[9] We need not decide if the court's specific conclusion that Gladigan was covered under order JYPAL02297-A, in particular, was correct, because both order JYPAL02297-A and JYPAL02297-B contained the insurance and indemnification language pertinent to this appeal. The *material* conclusions in the court's ruling were correct.

> under this clause. Chrysler's action or inaction will not act as a waiver of any of Chrysler's rights described in this clause.
>
> (b) Indemnification. Seller will defend, indemnify, and hold Chrysler harmless against all claims, liabilities, losses, damages, and settlement expenses in connection with any breach by Seller of these general conditions or for injury or death of any person and damage or loss of any property allegedly or actually resulting from or arising out of any act, omission or negligent work of Seller or its employees, agents, or subcontractors in connection with performing this order, either on Chrysler's property or in the course of their employment.

"When presented with a contractual dispute, a court must determine what the parties' agreement is and enforce it." *Brucker v McKinlay Transport, Inc,* 225 Mich App 442, 449; 571 NW2d 548 (1997). "Contractual language is to be given its plain and ordinary meaning, and technical and constrained constructions are to be avoided." *Id.* "An indemnity contract is construed in the same fashion as are contracts generally." *Zurich Ins Co v CCR & Co (On Rehearing),* 226 Mich App 599, 603; 576 NW2d 392 (1997). Moreover,

> Michigan courts have discarded the additional rule of construction that indemnity contracts will not be construed to provide indemnification for the indemnitee's own negligence unless such an intent is expressly clearly and unequivocally in the contract. . . . Instead, broad indemnity language may be interpreted to protect the indemnitee against its own negligence if this intent can be ascertained from "other language in the contract, surrounding circumstances, or from the purpose sought to be accomplished by the parties." [*Sherman v DeMaria Bldg Co,* 203 Mich App 593, 596-597; 513 NW2d 187 (1994), quoting *Fischback-Natkin Co v Power Process Piping, Inc,* 157 Mich App 448, 452; 403 NW2d 569 (1987); see also *Triple E Produce Corp v Mastronardi Produce, Ltd,* 209 Mich App 165, 172 (1995).]

Here, paragraph 11(b) clearly states that PDC will "hold Chrysler harmless against all . . . settlement expenses . . . for injury or death of any person . . . allegedly or actually . . . arising out of any act . . . of Seller or its employees, agents, or subcontractors in connection with performing this order, either on Chrysler's property or in the course of their employment" Clearly, the injury in question arose out of Gladigan's act of traversing the walkway in Chrysler's plant in connection with performing a purchase order between PDC and Chrysler. Under the above rules of statutory construction, it is plainly apparent that the indemnification clause covers the accident expenses regardless of Chrysler's negligence.

We acknowledge that in *Peeples v City of Detroit*, 99 Mich App 285, 295-298 (1980), *Darin & Armstrong v Ben Agree Co,* 88 Mich App 128, 135-136 (1979), and *Gartside v Young Men's Christian Ass'n,* 87 Mich App 335, 338-341 (1978), this Court found language similar to that involved in the instant case to be insufficient, standing alone, to allow coverage for an indemnitee's own negligence. We note, however, that these cases are not strictly binding on this Court under MCR 7.215(I)(1). Moreover, the cases in question cited the outdated rule rejected in *Sherman, supra* at 597. See *Gartside, supra* at 339, *Darin, supra* at 136, and *Peeples, supra* at 296. Finally, the presence of paragraph 11(a) directly above the indemnification language at issue in the present case reinforces that Chrysler was not to be held responsible for damages

arising out of the performance of the purchase order and that PDC was required to obtain insurance "in amounts and coverages sufficient to cover all claims hereunder" and to "name Chrysler as an additional insured."[10] Thus, the surrounding circumstances, see *Sherman, supra* at 597, demonstrate that Chrysler was not to be required to pay for injuries occurring in connection with the purchase order. The trial court's ruling was correct.[11]

Next, PDC argues that the court's award of case evaluation sanctions to Chrysler improperly included an amount of sanctions – $8,216.10 – that was "not necessitated by PDC's rejection of the [case] evaluation." PDC argues:

> As [Chrysler's attorney] admitted in his affidavit, . . . the fees charged by Illinois counsel together with some of the fees and costs charged by his own firm related to discovery which [Chrysler] attempted to obtain from . . .Hartford, PDC's insurance carrier, before . . . Hartford was added as a Third Party Defendant. It is important to note that [Chrysler] has no claim against . . . Hartford. The fees charged by the Illinois counsel were all related to an attempt to force a deposition of Hartford employee Tom Mondrala. It is undisputed that the deposition never occurred.
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> The remaining fees in question relate to the deposition of Frank White, an in house attorney for . . . Hartford whose testimony related to the reasons that . . . Hartford denied that it owed *insurance coverage to PDC*. The deposition was not taken until January 10, 2001, nearly a month after the dispositive motions on the primary claim had been argued and only two days before the judge rendered his opinion. . . . White's testimony was in no way used to determine the liability questions between [Chrysler] and PDC.

We disagree that the trial court erred in its award of case evaluation sanctions. We review the amount of attorney fees awarded by a court for an abuse of discretion. *Elia v Hazen*, 242 Mich App 374, 377; 619 NW2d 1 (2000).

Chrysler's attorney, William McCandless, filed an affidavit with the lower court in which he stated that he decided to depose Mondrala and Hartford (i.e., White, a Hartford representative) because (1) Mondrala, on behalf of Hartford and PDC, rejected Chrysler's claim for indemnity and (2) his (McCandless') review of the Hartford policy issued to PDC suggested that Chrysler might have been included under Hartford's policy, and he wanted to explore the issue with Hartford. McCandless stated, "In my judgment the prospective testimony of Mondrala and

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[10] PDC did not do so, and, as mentioned earlier, Chrysler sued for the breach of this agreement. As in *Peeples, supra* at 302, the trial court in this case appears to have considered this breach a separate basis for granting summary disposition to Chrysler.

[11] We note that because this case does not involve a construction contract and correlative statute, it does not present the public policy issues mentioned in *Peeples, supra* at 302, that deal with indemnification contracts within the construction industry that purport to indemnify a party for its own negligence.

Hartford would assist [Chrysler] in proving its claim against PDC and, in addition, assist it in collecting upon any judgment entered against PDC and in favor of [Chrysler]." McCandless indicated that he tried to compel the deposition of Mondrala and in the meantime found that White was available to be deposed. He stated that after he deposed White, he determined that Mondrala's deposition could be deferred until after the summary disposition ruling.

Given this affidavit and the arguments set forth therein, we cannot say that the trial court abused its discretion in allowing Chrysler to recover the fees associated with deposing Mondrala and White. First, Mondrala rejected Chrysler's claim for indemnification on behalf of PDC. Second, one count in the complaint related to PDC's failure to name Chrysler as an insured under the Hartford policy. Clearly, the depositions of Hartford employees were potentially relevant to the case and to an eventual trial. The court did not err in concluding that the challenged expenses were necessitated by the rejection of mediation as explained in *Michigan Basic Prop Ins Ass'n v Hackert Furniture Distributing Co, Inc*, 194 Mich App 230, 234-236; 486 NW2d 68 (1992). As noted in *Michigan Basic Prop*, "there is no exact science for determining which witnesses are unnecessary or important to which parties." *Id.* at 236. No abuse of discretion occurred.

In its cross-appeal, Chrysler raises an issue that would be relevant only if the order granting it summary disposition against PDC were reversed and the case were remanded for trial. Because we are affirming the grant of summary disposition to Chrysler, we need not address the issue raised by Chrysler.

Hartford, in its cross-appeal, takes issue with the court's grant of summary disposition[12] under MCR 2.116(I)(2)[13] to PDC in PDC's third-party suit against Hartford, in which PDC claimed that Hartford wrongfully refused to pay for the ultimate damages and legal expenses associated with the Chrysler lawsuit.[14]

Hartford first argues that the trial court erred in granting PDC summary disposition because the court should have first considered Hartford's motion to dismiss based on a pending federal action. Hartford states that before the entry of the court's written order[15] granting PDC's

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[12] As noted earlier, we review a trial court's grant of summary disposition de novo. *Spiek, supra* at 337.

[13] Hartford had previously moved for summary disposition in PDC's case against it. MCR 2.116(I)(2) states, "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

[14] The court's ruling on the issue was extremely brief. It stated, "There's a contract, Hartford is obligated to indemnify or PDC was obligated to indemnify Chrysler[.] Hartford covered PDC and the contract with Chrysler be it in Michigan or Twinsburg[,] Ohio, it does not matter, that purchase order contract covers it." The written order merely reiterated that Hartford was required to pay for the damages associated with Gladigan's accident.

[15] We note, however, that Hartford filed its federal declaratory action *after* the court's *oral* ruling regarding Hartford's liability to PDC.

motion to join Hartford as a third-party defendant, Hartford "filed a Declaratory Action in the United States Federal Court for the Eastern District of Michigan seeking to determine issues of coverage, duty to defend, and duty to indemnify." Hartford claims that "the federal court action was the first in time as between Hartford and PDC" and that the court was thus obligated to dismiss PDC's third-party complaint, because the prior action dealing with the same issues took precedence.[16]

We cannot agree that this issue warrants relief. First, Hartford's brief is contradictory in that it states:

> The fact that the federal action has now been dismissed subsequent to the entry of a final judgment against Hartford . . . unfortunately renders moot the specific relief Hartford would have sought from this Court, namely, reversal of [the court's] decisions with instructions to dismiss this action in deference to the federal action. Nevertheless, this Court should reverse the . . . [c]ourt's May 11, 2001 Order [dealing with Hartford's liability to PDC] and order dismissal of this action.

Hartford acknowledges that the issue is moot, yet desires appellate relief nonetheless. We do not address moot issues. See *School District of the City of East Grand Rapids, Kent County v Kent County Tax Allocation Bd,* 415 Mich 381, 390; 330 NW2d 7 (1982). Moreover, even though MCR 2.116(C)(6) states that an action may be dismissed if "[a]nother action has been initiated between the same parties involving the same claim," the Supreme Court in *Marsh v Foremost Ins Co,* 451 Mich 62, 72 n 15; 544 NW2d 646 (1996), stated:

> MCR 2.116(C)(6) ordinarily applies where the other pending action was filed *before* the action in which summary disposition is being considered. However, the interpleader situation is unique, in that a subsequently filed action can take precedence over an action filed earlier. [Emphasis in original.]

Therefore, it is apparent that MCR 2.116(C)(6) does not *always* operate to mandate the dismissal of a lawsuit when another has already been commenced. We view the situation in the instant case, where the rights and obligations of Hartford were linked with the lawsuit between Chrysler and PDC, and where the court ruled from the bench, before the filing of Hartford's federal action, that Hartford could be added as a third-party defendant in that initial lawsuit, as a situation in which the third-party case takes precedence over the federal action.[17] Reversal is unwarranted.

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[16] The trial court did not elaborate on its reasons for failing to entertain Hartford's motion for dismissal but merely stated, "I think this [PDC's complaint and motion for summary disposition] is properly before me.

[17] Also, we note that the main emphasis of Hartford's argument on appeal is that the court erred by *failing to consider* Hartford's motion for summary disposition based on MCR 2.116(C)(6) before proceeding to rule on PDC's request for summary disposition. However, the court *did*
(continued…)

Next, Hartford argues that the trial court erred in granting summary disposition to PDC because PDC, in its summary disposition brief, erroneously relied on the language of the order in the lawsuit between Chrysler and PDC. Hartford indicates that under the language of its policy with PDC, Hartford can be liable to cover Gladigan's accident only if a contract had been "executed" between Chrysler and PDC before the accident. Although the court's order in the lawsuit between Chrysler and PDC stated that the purchase order terms "were in writing, executed and in existence prior to 3 February 1997," Hartford claims that this written order did not actually comply with the court's oral ruling, because the court did not refer to any execution in its oral ruling. Hartford thus claims that PDC's reliance on the written order in moving for summary disposition against Hartford was inappropriate. This argument is patently without merit. First, MCR 2.602(B)(2) indicates that a court shall enter a judgment or order "if, in the court's determination, it comports with the court's decision." Clearly, by allowing the order to be entered, the trial court concluded that the order did indeed comport with its decision. Second, Black's Law Dictionary (5th Ed) defines "executed" as, among other things, "completed; carried into full effect; already done or performed; signed; taking effect immediately." Hartford itself claims that "execute" means "perform what is required to give validity to." By finding that PDC was bound to indemnify Chrysler under the contract in question, the court obviously determined that the contract had been "carried into full effect" and "give[n] validity." Indeed, Chrysler and PDC would not have been bound by the contract if it had not been executed.[18] This issue does not warrant reversal.

Next, Hartford claims that the trial court erroneously relied on the "law of the case" doctrine in granting summary disposition to Hartford because the "law of the case" doctrine applies only to ruling from appellate courts. See *In re Forfeiture of $19,250 v Smith*, 209 Mich App 20, 30; 530 NW2d 759 (1995). Again, this argument is patently without merit. Indeed, regardless of whether PDC argued the doctrine, there is no indication that the court relied on this doctrine in its ruling. The court merely noted that Hartford was responsible for reimbursing PDC under the terms of the insurance policy. This ruling was correct. Hartford's policy with PDC states that Hartford will pay "those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies." The policy excludes coverage for "bodily injury" for which the insured assumed liability in a contract or agreement, but there is an exception to this exclusion for an executed "insured contract," which is defined as "[t]hat part of any other contract or agreement pertaining to your business . . .

(…continued)

address Hartford's motion, albeit very briefly, before ruling on PDC's motion. As noted in footnote 15, *supra*, the court stated, "I think this [PDC's complaint and motion for summary disposition] is properly before me." This statement occurred before the court ruled on PDC's motion.

[18] In a reply brief, Hartford contends that the contract had not been signed and that it therefore did not operate to require Hartford to cover Gladigan's accident. However, Hartford points to no language in its policy with PDC requiring a "signed" contract. Evidently, Hartford is suggesting that the contract had not been "executed" because it had not been signed. We cannot accept this argument. Indeed, we do not agree that an "executed" contract must necessarily be signed. Moreover, Hartford attempts to raise the issue of signing in its reply brief, but MCR 7.212(G) clearly indicates that reply briefs "must be confined to rebuttal of the arguments in the appellee's or cross-appellee's brief . . . ."

under which you assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization." In light of the court's finding that an executed contract existed between Chrysler and PDC, coverage for Gladigan's injuries clearly fell within the above provisions.

Next, Hartford argues that summary disposition should not have been granted to PDC because Chrysler did not constitute an "additional insured" under Hartford's policy with Chrysler. Again, this argument does not warrant appellate relief. First, Hartford was clearly obligated to pay for Gladigan's injury under the policy provisions cited above, and therefore whether Chrysler was an "additional insured" under the policy is irrelevant. Further, the evidence demonstrates that Chrysler did indeed qualify as an "additional insured" under the policy. The policy states that "who is an insured

> is amended to include as an insured any person or organization with whom you [PDC] agreed, because of a written contract or agreement or permit, to provide insurance such as is afforded under this policy, but only with respect to your operations, "your work" or facilities owned or used by you.

The policy defines "your work" as "[w]ork or operations performed by you or on your behalf." Clearly, the accident occurred "with respect to . . . [w]ork or operations performed" by PDC.

Hartford additionally claims that PDC and the trial court misinterpreted or ignored the deposition testimony of Frank White, a Hartford employee. Among other things, Hartford emphasizes White's testimony that he had reason to believe that a contract between Chrysler and PDC had not been executed before Gladigan's accident. Hartford's focus on White's testimony is unavailing. Indeed, the trial court clearly found, in the original lawsuit, that an executed contract existed between Chrysler and PDC, and it properly used this finding to determine that, under the clear terms of Hartford's insurance policy with PDC, Hartford was obligated to cover PDC for Gladigan's injury. White's unsupported allegation that no executed contract existed before Gladigan's injury did not serve to create a genuine issue of material fact, in light of the trial court's prior finding that an executed contract existed between Chrysler and PDC.[19] Hartford states on appeal that "there is no showing that the term 'executed' as to Chrysler and PDC has the same meaning as that term has under Hartford's policy . . . ." This argument is specious, as there is no evidence on which to conclude that the term "executed" under the Hartford policy has some type of special or unusual meaning not in accordance with the ordinary definition. The court, in granting summary disposition to PDC in its lawsuit against Hartford,

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[19] In *Michigan Gas Utilities v Public Service Comm*, 200 Mich App 576, 581; 505 NW2d 27 (1993), this Court noted that if an indemnitor had notice of a proceeding against an indemnitee, then the judgment against the indemnitee is binding on the indemnitor. This case persuades us that because Hartford had notice of the suit between PDC and Chrysler, it is bound by the finding of an executed contract.

implicitly concluded that the contract had indeed been "executed" for purposes of the Hartford policy, and this conclusion violated no legal precepts.[20] Reversal is unwarranted.

In Docket No. 235741, Hartford argues that the court erred in ruling that Hartford must reimburse PDC for attorney fees PDC expended in retaining another law firm in addition to that hired for PDC by Hartford. We review a trial court's decision to award attorney fees for clear error, while the amount of the award is reviewed for an abuse of discretion. *Michigan Educations Employees Mut Ins Co v Turow*, 242 Mich App 112, 117; 617 NW2d 725 (2000).

It is undisputed that Hartford, under its duty to defend PDC, hired a law firm (firm 1) to represent PDC in the action initiated by Chrysler. However, when Hartford informed PDC that it would not indemnify PDC or Chrysler for any payment made in connection with Gladigan's injuries, PDC hired an additional law firm (firm 2) to aid in its representation. The court, without articulating its reasoning, granted PDC's motion for reimbursement with respect to firm 2's fees. We cannot agree with the court's ruling. Indeed, the only basis PDC gave below for seeking the fees was Hartford's alleged "failure to defend." However, it is undisputed that Hartford hired firm 1, as independent counsel, to represent PDC, and PDC cited no evidence in its motion for attorney fees that firm 1 provided inadequate representation. In fact, any possible claims of bad faith were dismissed before PDC filed its motion for attorney fees. As noted in *Michigan Millers Mut Ins Co v Bronson Planting Co*, 197 Mich App 482, 492; 496 NW2d 373 (1993), an award of attorney fees for the hiring by an insured of additional counsel, in addition to the counsel hired by the insurance company, is not appropriate "[i]n the absence of any record showing . . . that the [initial] law firm in fact acted against the interests of [the insured] . . . ." There is no such record showing in this case. PDC claims that "Hartford breached its duty to defend because it failed to provide an adequate defense." The only potential basis proffered by PDC on appeal in support of this claim of an inadequate defense is a statement made by a firm 2 attorney, Albert Addis, at the hearing on PDC's motion for attorney fees. Addis stated:

> . . . my client expended money after being denied indemnity eight days before mediation was to be either accepted or rejected. That put the Defense Counsel that had been selected by Hartford, Mr. Bowen, in an extremely difficult position. And even though the letter denying indemnity suggested that the client call Mr.

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[20] In its final argument on appeal, Hartford claims that it is not required to cover Gladigan's injuries because the contract between PDC and Chrysler was not "executed." This argument is merely a rehash of Hartford's earlier arguments and will not be separately addressed by this Court. Similarly, the arguments raised by Hartford in its reply brief are largely cumulative and will not be addressed separately. To the extent Hartford argues that it cannot be responsible for coverage based on PDC's breach of the duty to name Chrysler as insured, we first emphasize, once again, that reply briefs cannot raise new issues but must be confined to a rebuttal of the appellee's or cross-appellee's arguments. MCR 7.212(G). We also remind Hartford that the indemnification provision in the contract between PDC and Chrysler provided an additional basis, besides the "naming Chrysler as an additional insured" requirement, for the court's ruling in the initial lawsuit.

> Bowen, Mr. Bowen was not comfortable that [sic] being in that position suggested other counsel. We became the other counsel.[21]

This bald statement by Addis did not provide a sufficient basis for the court to conclude that firm 1 provided an inadequate defense.

Moreover, as noted on appeal by Hartford, PDC's claim for attorney fees was simply a "veiled attempt to seek damages for its claim for breach of the duty to defend." Perhaps such an attempt to obtain these damages would have been viable if brought as part of the principal claim by PDC against Hartford and not in a post-judgment motion. However, PDC did not seek these fees in its principal claim against Hartford. We conclude that its attempt to obtain them by way of a post-judgment motion for attorney fees was improper. As noted in *Burnside v State Farm Fire & Casualty Co*, 208 Mich App 422, 426-427; 528 NW2d 749 (1995), "Under the American rule, attorney fees are generally not allowed, as either costs or damages, unless recovery is expressly authorized by statute, court rule, or a recognized exception." PDC cites no authority for the proposition that attorney fees for an insurance company's alleged refusal to defend can be obtained by way of a post-judgment motion. The trial court erred in ruling that Hartford must reimburse PDC for the fees of firm 2.

We affirm in Docket No. 234827 and reverse in Docket No. 235741.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Bill Schuette

[21] Addis further indicated that in the submission of fees, he had not listed any fees associated with PDC's lawsuit against Hartford but only fees associated with the underlying lawsuit.